STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA, Respondent, and JOSE OCEGUEDA, JUAN MAGALLANES, AVELINO PADILLA, Charging Parties.	)	Case Nos. 07-CL-5-SAL 07-CL-6-SAL 07-CL-7-SAL 37 ALRB No. 3 (November 1, 2011)

DECISION AND ORDER

On June 27, 2001, Administrative Law Judge (ALJ) Doug Gallop issued the attached decision in the above-referenced case. The General Counsel alleged in the complaint that the United Farm Workers of America (UFW or Respondent) breached its duty of fair representation to Charging Parties Jose Ocegueda, Juan Magallanes, and Avelino Padilla (Charging Parties) by failing to pursue a grievance for wages allegedly owed under terms of the collective bargaining agreement with San Martin Mushrooms, Inc. (Employer). The ALJ dismissed the complaint in its entirety. Pursuant to California Code of Regulations, title 8, sections 20280 and 20282 General Counsel filed timely exceptions, and Respondent filed a response.

The Agricultural Labor Relations Board (ALRB or Board) has considered the record and the ALJ's findings of fact and conclusions of law in light of the exceptions and briefs filed by the parties and adopts the ALJ's findings of fact and conclusions of

law to the extent consistent with the decision below. The Board agrees with the ALJ's decision that the General Counsel has failed to establish a breach of Respondent's duty of fair representation and affirms the dismissal of the complaint in its entirety.

Standard of Review

The Board shall review the applicable law and evidence and determine whether factual findings are supported by a preponderance of the evidence taken. (Cal. Code Regs., tit. 8, § 20286(b).) The Board will not disturb credibility resolutions based on demeanor unless the clear preponderance of the evidence demonstrates that they are in error. (*P.H. Ranch* (1996) 22 ALRB No. 1; *Standard Drywall Products* (1950) 91 NLRB 544, *enf'd.* (3d Cir. 1951) 188 F.2d 362.) In instances where credibility determinations are based on things other than demeanor, such as reasonable inferences, consistency of witness testimony, or the presence or absence of corroboration, the Board will not overrule the ALJ's credibility determinations unless they conflict with well-supported inferences from the record considered as a whole. (*S & S Ranch, Inc.* (1996) 22 ALRB No. 7.)

Background

On November 8, 2006, in Case No. 06-RC-01-SAL, Respondent was certified as the exclusive collective bargaining representative of the agricultural employees of Employer. Respondent and Employer entered into a collective bargaining agreement (CBA) effective from August 1, 2007 through July 31, 2010. Section 15.13 of the agreement provided in pertinent part:

> 15.13 RATES ON TRANSFERS
>
> If the situation arises where the Company needs to assign a worker(s) to perform the work in another classification with a lower rate of pay, he/she shall be paid their regular wage or average rate of pay. If the rate of pay is higher then the worker shall be paid the higher rate. (G.C. Ex. 1.)

Charging Parties Jose Ocegueda, Juan Magallanes, and Avelino Padilla worked primarily as mushroom harvesters with about twelve others and were paid on a piecerate basis for that work. In addition, they performed labor referred to as "general labor" for which they had been paid the minimum hourly wage, usually less than their average piecerate earnings. For the period in question, 2007, the general labor wage rate was $7.50 per hour, while the average piecerate per pound was $.01470.

When the workers learned of the above-cited contractual provision, they believed they would receive higher earnings performing general labor work given that their average piecerate wages for harvesting were higher than minimum wage. Their first paychecks after the CBA became effective showed that they were still being paid minimum wage for their general labor duties, so they complained to their union representative, Sergio Guzman.

According to the testimony of Guzman and one of San Martin's owners, Susan Marie Gardner, which the ALJ credited, Guzman met with Susan Gardner and sometimes with her husband and co-owner, Bud Gardner, on four occasions at Step 1 (verbal) of the grievance process to secure the higher wage rate for the workers' general labor work. The Gardners responded that they did not understand Section 15.13 to require a higher rate of pay for general labor work. They understood Section 15.13 to

provide that when a worker performed duties in a *higher-paid* classification, he or she would be paid the higher rate. They further stated that their attorney made a mistake in formulating the contractual language and that they had never paid employees a higher wage for performing duties in a lower-paying classification, nor did they intend to change that practice.

Guzman continued to press for payment at the higher rate but he eventually dropped the grievance. Guzman believed the Gardners' claim that they could not afford to pay the difference in wages and they would instead hire workers to perform the general labor work at the lower rate rather than use the harvesters and pay them their higher wage. Guzman wanted to preserve the general labor work for the existing workers rather than lose it to new hires. Guzman and the Gardners agreed to a contract modification that excluded the higher pay provision in Section 15.13 and made the general labor work voluntary for the harvesters.

Charging Parties filed their charges on October 5, 2007, the date of the last Step 1 grievance meeting between Guzman and the Gardners, alleging that Guzman had not taken any action to address contract violations brought to his attention by the Charging Parties and others. Guzman testified that on October 9, 2007, he explained what had been agreed to and asked who would be willing to continue performing general labor work at a rate of pay lower than the harvester piece rate pay. Seven workers were willing; eight refused. While Guzman testified that he also conducted a ratification vote on the proposed contract modification that same day, the Charging Parties refuted this

testimony and the ALJ credited Charging Parties' testimony on this point. The Charging Parties did not formally request that Guzman take the grievance to arbitration.

The contract modification between Employer and Respondent was executed October 15, 2007, and read as follows:

> Employees classified as Harvesters/Laborers have had a long-standing past practice of performing harvesting functions at the applicable piece rate and labor work at the applicable hourly laborer rate. However, to resolve an issue as to the applicability of section 15.13 of the Contract, current Harvester/Laborers shall be allowed to choose whether they want to continue to be classified as Harvesters/Laborers or whether they want to be classified only as Harvesters.
>
> Employees choosing to be classified simply as Harvesters will normally perform only Harvesting work. Employees choosing to continue to be classified as Harvesters/Laborers will continue to perform harvesting work at the applicable piece rate and laborer work at the applicable laborer rate. The parties agree that section 15.13 of the Contract shall not apply to employees classified as Harvesters/Laborers when they perform laborer work. Employees choosing to be classified as Harvesters only shall have the right to go back to being classified as Harvesters/Laborers if they change their mind within 45 days of the date of this Letter of Understanding.
>
> The parties agree that on days where harvesting is light and there is less than 4 hours of harvesting work available, employees classified as Harvesters will not be guaranteed 4 hours of working according to section 14.16 of the contract.
> (Union's Ex. 1).

The General Counsel issued a consolidated complaint on May 19, 2010, which was amended twice and nowhere alleged which sections of the Agricultural Labor Relations Act (Act) Respondent were violated. The General Counsel later conceded that Respondent, as exclusive collective bargaining representative, acted lawfully in entering into the contract modification absent a showing of motivation based on prohibited

considerations. The General Counsel maintained that Respondent violated its duty of fair representation by failing to pursue the grievance pertaining to the higher wages that allegedly should have been paid the harvesters for the general labor work they performed prior to the contract modification. The General Counsel further contended that Respondent had bargained away vested wage rights when it negotiated the contract modification, and Respondent was liable to pay the harvesters all the money they earned, above the general labor rate, from the effective date of the contract to the effective date of the contract modification.

The ALJ dismissed the complaint in its entirety, concluding that although Respondent dropped what the ALJ considered to be vested claims, that did not establish that Charging Parties were prevented from pursuing the claims on their own, as the contract modification did not refer to or cover the wage claims that accrued prior to its effective date. The ALJ further concluded that Respondent did not violate its duty of fair representation and no backpay award was appropriate.

The General Counsel argued, in summary, the following in its exceptions to the ALJ's decision:

1) Unions do not have such "wide latitude" in deciding how far to process a grievance when the grievance involves vested and accrued rights, and the General Counsel does not need to show some invidious cause in that case to prove the union breached its duty of fair representation;
2) Respondent acted arbitrarily and in bad faith by bargaining away the harvesters' vested wages;

3) The October 15 amendment did not state that it applied only prospectively and, as such, eliminated the harvesters' vested wages;

4) The General Counsel did not have to prove that the contract modification precluded enforcement actions by the aggrieved members in superior court in order to prove that respondent breached its duty of fair representation; and

5) The ALJ's finding that no backpay award is appropriate is incorrect, premature, and not relevant to his decision on the merits.

Discussion

Succinctly put, the legal issues raised by General Counsel's exceptions are: 1) Whether Respondent breached its duty of fair representation in violation of section 1154(a)(1)[1] by not pursuing a grievance for higher general labor work wages allegedly earned by harvesters prior to the effective date of the contract modification; 2) whether Respondent bargained away any vested wages by virtue of the contract modification such that it breached its duty of fair representation; and 3) whether Respondent is liable for

[1] Section 1154(a)(1) of the Agricultural Labor Relations Act provides:

> 1154. It shall be an unfair labor practice for a labor organization or its agents to do any of the following:
>
> (a) To restrain or coerce:
>
> (1) Agricultural employees in the exercise of the rights guaranteed in Section 1152. This paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

All statutory references are to the California Labor Code unless otherwise stated herein.

backpay for breaching said duty of fair representation. We answer each contention in the negative.

A. Duty of Fair Representation and Failure to Pursue Wage Grievance

The General Counsel argues that case law does not support giving unions "wide latitude" in deciding how far to process grievances when they involve vested and accrued rights, and the U.S. Supreme Court "guidelines" have limited the union's discretion to bargain away vested rights. Assuming *arguendo* that there was a vested right at issue here, a brief discussion of a union's duty of fair representation under the National Labor Relations Act (NLRA) [2] as interpreted by the U.S. Supreme Court precedent is merited.

One of the seminal cases with regard to the duty of fair representation under the NLRA is *Ford Motor Co. v. Huffman* (1952) 345 U.S. 330, in which employees challenged the authority of their union to agree through collective bargaining to a seniority system that extended seniority based on military service earned prior to employment at Ford Motor Company. The Court sided with the union, noting that although differences will arise in the manner and degree to which the terms of a negotiated agreement affect individual employees and classes of employees, the mere existence of such differences does not make such agreements invalid. The Court noted

[2] 29 United States Code section 151 *et seq*. Section 1154(a)(1) of the Agricultural Labor Relations Act (ALRA) parallels section 8(b)(1)(a) of the National Labor Relations Act, 29 United States Code section 158(b)(1)(a). Section 1148 of the ALRA provides that the Board shall follow applicable precedents of the National Labor Relations Act as amended.

that a "wide range of reasonableness" must be allowed a union in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. (*Ford Motor Co. v. Huffman, supra*, 345 U.S. at 338.)

The Court further expounded on the duty of fair representation with respect to a union taking a position in an arbitration that was adverse to some of its members in *Humphrey v. Moore* (1964) 375 U.S. 335. In *Humphrey*, the union at issue represented employees at two separate companies, one of which was being acquired by another. The union took the position in arbitration that the seniority lists for the two companies should be dovetailed, and the employees of the acquiring company alleged breach of the duty of fair representation by the union in taking such a position. The Court held the union had the authority under the NLRA to decide to dovetail the seniority lists and further held there was no breach of the duty of fair representation because the union took its position in good faith and without hostility or arbitrary discrimination. (*Humphrey v. Moore, supra*, 375 U.S. at 348-349.)

The duty of fair representation with respect to the processing of individual grievances was addressed by the Court in *Vaca v. Sipes* (1967) 386 U.S. 171. In *Vaca*, an employee who alleged wrongful discharge due to poor health in violation of a collective bargaining agreement also alleged that his union breached the duty of fair representation by failing to take his grievance to arbitration beyond the fourth step in the grievance process. The union decided not to pursue the grievance because a physical examination it requested the employee take had unfavorable results. The Court reiterated that a breach of the duty of fair representation occurs only when a union's conduct toward a member of

a collective bargaining unit is arbitrary, discriminatory, or in bad faith. (*Vaca v. Sipes, supra*, 386 U.S. at 189.) The Court held that although a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner, an individual employee did not have an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. (*Id.* at 193.) In this case, there was no evidence that the union ignored the employee's grievance, was hostile to the employee, or acted at any time other than in good faith. (*Id.*)

In *Air Line Pilots Association, International v. O'Neill* (1991) 499 U.S. 65, the Court further refined the standard for finding a breach of the duty of fair representation, holding that the rule announced in *Vaca v. Sipes* – that a union breaches its duty of fair representation if its actions are either "arbitrary, discriminatory, or in bad faith" – applies to all union activity, including contract negotiation. (*Air Line Pilots Ass'n., supra*, 499 U.S. at 67.) The Court held that a union's actions are arbitrary if and only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior was so far outside a wide range of reasonableness as to be irrational. (*Id*.) *Air Line Pilots Association* involved the negotiation of a settlement of a strike that included terms favoring those pilots willing to settle all outstanding claims against the employer, Continental Airlines, for return to work over those pilots who were unwilling to settle their outstanding claims.

What *Ford Motor Company, Humphrey, Vaca, and Air Line Pilots Association* stand for is the proposition that a breach of the duty of fair representation is not proven solely because a union does not pursue or chooses to compromise a

meritorious grievance. There must also be a showing that the union simply ignored the grievance or acted in a manner that was arbitrary, invidious, in bad faith, or so far outside the wide range of reasonableness as to be wholly irrational. It appears that the General Counsel would have the Board adopt a different standard. We decline to do so, as we find no basis for departing from precedent established under the NLRA.

1. Failure to Pursue Grievance for Non-Payment of Vested Wages

The General Counsel argues that, by definition, a union "arbitrarily ignores a meritorious grievance" and "acts against those whom it represents" when it sets aside a legally enforceable collective bargaining provision which it negotiated and which was ratified by bargaining unit members. (General Counsel's Brief at p. 4.) Not so.

Even assuming the General Counsel's characterization of the merit of the grievance at issue to be true, it is a stretch of U.S. Supreme Court precedent to conclude that setting aside a meritorious grievance is the equivalent of arbitrarily ignoring such a grievance or acting against those whom the union represents. The *Vaca* Court made clear that there is no absolute right to have a grievance, meritorious or otherwise, taken to arbitration, (*Vaca, supra*, 386 U.S. at 191), and the *Air Line Pilots Association* Court held that a union's actions are arbitrary *if and only if, in light of the factual and legal landscape at the time of the union's actions*, the union's behavior was so far outside a wide range of reasonableness as to be irrational. (*Air Line Pilots Association supra,*, 499 U.S. at 67 (emphasis added).)

The ALJ's decision and the record before us shows that Guzman clearly did not ignore the grievance or process it perfunctorily. Instead, weighing what he perceived

to be the financial position of the employer and the possibility of loss of work from the harvesters to new employees, he negotiated a contract modification that preserved the option of doing general labor work for the harvesters without addressing any rights under Section 15.13 that accrued prior to the contract modification, even if he thought it had. It is not unreasonable for Guzman to have concluded that, had the Gardners agreed to his interpretation of Section 15.13 going forward, the harvesters might have won the difference between their piece rate wages and general labor wages but might have also lost the option of doing general labor work going forward. In view of the factual and legal landscape at the time of Guzman's actions on the grievance, the General Counsel failed to establish a breach of the duty of fair representation under any U.S. Supreme Court "guidelines."

2. Bargaining Away Vested Rights In Violation of the Duty of Fair Representation

The General Counsel argues that, by virtue of not pursuing a meritorious grievance for wages due under Section 15.13 of the contract, the union violated the duty of fair representation because a union cannot bargain away vested rights. The General Counsel is correct in its characterization of the law, but incorrect in its characterization of the facts.

The General Counsel is correct that there is case law to the effect that a union cannot bargain away employees' vested rights, (*see, e.g., Hauser v. Farwell, Ozmun, Kirk & Co.* (D. Minn. 1969) 299 F. Supp. 387, 393), or agree to changes in a collective bargaining agreement that have retroactive effects upon accrued rights or

claims. (*Elgin, Joliet & Eastern Railway Co. v. Burley* (1945) 325 U.S. 711.) However, the General Counsel's argument fails on legal grounds for two reasons. First, the cases it cites – *Hauser*, *Elgin*, as well as *Shatto v. Evans Products Co.* (9th Cir. 1984) 728 F.2d 1224 and *Adams v. Gould* (E.D. PA. 1981) 1981 U.S. Dist. LEXIS 17535, *rev'd on other grounds* (3d Cir. 1982) 687 F.2d 27 -- address the issue of bargaining away vested pension benefits, not wage claims under disputed contract terms. As such, they are inapposite to the facts of this case.

The General Counsel's argument fails similarly on factual grounds. The General Counsel conceded that the contract modification was entered into lawfully. The contract modification by its plain language did not compromise any claims under the prior wage term of Section 15.13. Even were we to accept the General Counsel's argument that failing to pursue a meritorious grievance is the equivalent of bargaining away a vested right, it is arguable that any wage claims under Section 15.13 of the contract could be considered "vested" because the language of the term is, in our view, ambiguous. It is on this point that we disagree with both the General Counsel and the ALJ's decision below.

A "vested right" is commonly defined as "a right that so completely and definitely belongs to a person that it cannot be impaired or taken away without that person's consent." (*Newspaper Guild of St. Louis, Local 36047 v. St. Louis Post Dispatch, LLC* (8th Cir. 2011) 641 F.3d 263, 266.) Section 15.13., the disputed term, stated:

> If the situation arises where the Company needs to assign a worker(s) to perform work in another classification with a lower rate of pay, he/she shall be paid their regular wage or average rate of pay. If the rate of pay is higher [sic] then the worker shall be paid the higher rate.

The last sentence, "If the rate of pay is higher [sic] then the worker shall be paid the higher rate" is ambiguous as to whether the "higher rate" being referred to is the rate of pay attached to a higher classification that harvesters might be assigned to work in or the rate of pay attached to the classification the harvesters occupied as compared to the general labor rate.

California's Civil Code has precise dictates on the interpretation of contracts, requiring that all contracts be interpreted by the same rules unless otherwise provided by the Civil Code (Civ. Code § 1635), and that contracts are interpreted as to give effect to the mutual intention of the parties as existed at the time of the contracting (Civ. Code §1636). If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense which the promisor believed, at the time of making it, that the promisee understood it. (Civ. Code § 1649).

The fact that the parties had different intentions regarding Section 15.13 is clear from the record. What is not clear is what the promisor, San Martin Mushrooms, believed the promisee, the Union, understood about Section 15.13 at the time it was agreed to. Given the ambiguity of the term and the unresolved factual issues as to the intent of the parties at the time the term was agreed to, it is far from clear that any clearly vested wage claim existed under the terms of Section 15.13. The General Counsel's

argument on this point is without merit. It follows that any claim for backpay similarly fails.

ORDER

The complaints in Case Numbers 07-CL-5-SAL, 07-CL-6-SAL, and 07-CL-7-SAL are dismissed in their entirety.

Dated: November 1, 2011

GENEVIEVE A. SHIROMA, Chair

CATHRYN RIVERA-HERNANDEZ, Member

CAROLE V. MIGDEN, Member

CASE SUMMARY

UNITED FARM WORKERS OF AMERICA Case Nos. 07-CL-5-SAL, et al.
(Jose Ocegueda, et al.) 37 ALRB No. 3

Respondent United Farm Workers of America and Employer San Martin Mushrooms, Inc. entered into a collective bargaining agreement (CBA) that provided that if the Employer needed to assign a worker to perform work in another classification with a lower rate of pay, he/she would be paid his/her regular salary, but if the rate of pay was higher, then the worker would be paid the higher rate. Charging Parties Jose Ocegueda, Juan Magallanes, and Avelino Padilla (Charging Parties) worked primarily as mushroom harvesters on a piecerate basis. Charging Parties also performed general labor for minimum hourly wage. Charging Parties believed they would receive their average piecerate wages for performing general labor under the contract term, as their average piecerate wages were higher than minimum wage. Their first paychecks after the CBA became effective showed they were still being paid minimum wage for their general labor duties, so they complained to their union representative, Sergio Guzman.

Guzman met with San Martin's owners about Charging Parties' grievance. The owners understood the contractual provision to provide that only when a worker performed duties in a higher-paid classification, he or she would be paid the higher rate. They stated they could not afford to pay the differences in harvester wages general labor wages for the general labor work performed and would hire workers to do the general labor work at the lower rate rather than use the harvesters and pay them a higher wage. Guzman wanted to preserve the general labor work for the existing workers rather than lose it to the new hires. Guzman and San Martin's owners executed a contract modification that excluded the higher pay provision and made the general labor work voluntary for the harvesters.

Charging Parties filed their charges on October 5, 2007. The General Counsel filed a consolidated complaint on May 19, 2010. The General Counsel maintained that Respondent violated its duty of fair representation by failing to pursue the grievance and bargaining away vested wage rights when it negotiated the contract modification, and that Respondent was liable for backpay to Charging Parties. The Administrative Law Judge (ALJ) dismissed the complaint in its entirety, concluding that although Respondent dropped what the ALJ considered to be vested claims, Respondent's failure to pursue the grievance did not prevent Charging Parties from pursuing claims on their own. The ALJ also concluded that Respondent did not violate its duty of fair representation and no backpay was appropriate. The General Counsel filed exceptions.

The Board affirmed the decision of the ALJ. Citing *Ford Motor Co. v. Huffman* (1952) 345 U.S. 330, *Humphrey v. Moore* (1964) 375 U.S. 335, *Vaca v. Sipes* (1967) 386 U.S. 171, and *Air Line Pilots Association, International v. O'Neill* (1991) 499 U.S. 65, the Board held that a breach of the duty of fair representation is shown when a union ignores a grievance of acts in a manner that is arbitrary, invidious, in bad faith, or so outside the wide range of reasonableness as to be wholly irrational. The Board found that it was not unreasonable for Guzman to fail to pursue the grievance as a means of preserving the general labor work for existing employees. The Board further held that the contract language at issue was ambiguous such that there were no vested wage rights at issue and the contract modification did not compromise employees' claims under the prior wage term of the CBA.

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STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA,	)	
	)	**Case Nos.** 07-CL-05-SAL
Respondent,	)	07-CL-06-SAL
	)	07-CL-07-SAL
and	)	
	)	
JOSE OCEGUEDA,	)	
JUAN MAGALLANES,	)	
AVELINO PADILLA,	)	
	)	
Charging Parties.	)	

Appearances:

Mario Martinez
United Farm Workers Legal Department
Bakersfield, California
For the Charging Party

Joseph Mendoza
Salinas ALRB Regional Office
For General Counsel

DECISION OF THE ADMINISTRATIVE LAW JUDGE

DOUGLAS GALLOP: I conducted a hearing in this matter on April 19 and 20, 2011, at Salinas, California. The Charging Parties, Jose Ocegueda, Juan Magallanes and Avelino Padilla, filed charges alleging that United Farm Workers of America (hereinafter Respondent) violated the Agricultural Labor Relations Act (hereinafter Act or ALRB), by failing to take any action on their grievances alleging violations of a collective bargaining agreement by their employer, San Martin Mushrooms, Inc. In doing so, Respondent is alleged to have breached its duty of fair representation. The General Counsel of the Agricultural Labor Relations Board (ALRB or Board) issued a Consolidated Complaint, which was amended twice, (the final version is hereinafter referred to as the complaint) alleging said violation.[1] Respondent filed an answer, denying the commission of unfair labor practices, and alleging affirmative defenses. After the hearing, General Counsel and Respondent submitted post-hearing briefs, which have been duly considered.

Upon the entire record in this case, including the testimony of the witnesses, the documentary evidence received at the hearing, the parties' briefs and other arguments made by counsel, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Jurisdiction

The charges were filed and served in a timely manner. Respondent is a labor organization, within the meaning of section 1140.4(f) of the Act. Sergio Guzman was, at

[1] General Counsel nowhere alleges which section(s) of the Act Respondent violated. As discussed below, the undersigned assumes General Counsel is referring to section 1154(a)(1).

all times material herein, an agent of Respondent. San Martin Mushrooms, Inc. (San Martin) was and is an agricultural employer, within the meaning of section 1140.4(c). At all times material to this case, the Charging Parties, and their co-workers, were agricultural employees, within the meaning of section 1140.4(b).

The Alleged Unfair Labor Practice

On November 8, 2006, in Case No. 06-RC-01-SAL, Respondent was certified as the exclusive collective bargaining representative of the agricultural employees of San Martin. Respondent and San Martin entered into a collective bargaining agreement, effective from August 1, 2007 through July 31, 2010. Section 15.13 of the agreement provided, in pertinent part:

> If the situation arises where the Company needs to assign a worker(s) to perform work in another classification with a lower rate of pay, he/she shall be paid their regular or average rate of pay. If the rate of pay is higher then the worker shall be paid the higher rate.

The Charging Parties worked primarily as mushroom harvesters, with about 12 others. They were paid on a piecerate basis for that work. Their jobs required a brief amount of bed preparation, and additional labor, such as fabricating boxes and filling the planting beds with soil, not directly related to harvesting. For these functions, referred to as "general labor," the workers had been paid the minimum hourly wage, usually less than their average piecerate earnings. The general labor work was mandatory. When the workers learned of the above-cited contractual provision, they were looking forward to the higher earnings they would receive, as general laborers, as the result of the change.

When the workers received their paychecks, after the agreement became effective, they were still being paid the minimum wage for their general labor duties. They complained to Sergio Guzman, their union representative. There is some disagreement as to what transpired thereafter, between the Charging Parties, Guzman and one of San Martin's owners, Susan Marie Gardner. For the most part, Guzman, as corroborated and augmented by Gardner, and the notes he made in his appointment calendar, was much more reliable, from the standpoint of his recall and consistency in testimony. It is also noted that the conversations between Guzman and the Gardners were in English, and Guzman clearly did not translate, to the workers (who are Spanish-speaking), much of what they discussed. Therefore, the following facts, with one exception, are from the testimony of Guzman and Gardner.

Guzman met with Susan and (sometimes) Bud Gardner, San Martin's owners, and Manager Greg Gardner on four occasions at Step 1 of the contractual grievance procedure, commencing on September 18, 2007.[2] Two of the Charging Parties were present during these meetings. Guzman stated that San Martin was not paying the contractual rate (e.g. their higher average piecerate as harvesters) when mushroom harvesters performed general labor work. The Gardners responded they did not understand the contract to require a higher rate of pay for this. Rather, they thought the contract provided that when a worker performed duties in a *higher-paid* classification, he or she would be paid the higher rate. When Guzman persisted in his interpretation, the

[2] All dates hereinafter refer to 2007, unless otherwise indicated. The grievance procedure contained three steps: verbal, written and arbitration.

Gardners replied their attorney had made a mistake in formulating the contractual language. They stated employees had never been paid a higher wage rate for performing job duties in a lower-paying classification, and they had no intention of changing that practice.

Guzman continued to press for payment at the contractual rate. The Gardners stated they could not afford to pay the difference, because the company was in a poor financial state. If they were required to pay the difference, the company might have to close. To avoid this, they would hire new employees to only perform the general labor work, at the lower rate, rather than using the harvesters, and having to pay them more.

The parties continued discussing the issue, until Guzman decided, in essence, to drop the grievance. He did this because, based on his observations, he believed the Gardners' claim that the company was in poor financial condition. He also wanted to preserve work for the existing workforce, rather than lose it to new hires. One of the Charging Parties stated that if the lower rate was going to be paid, the work should be voluntary. After further negotiations, the Gardners agreed to this. As the result, a contract modification was drafted, deleting the provision for the higher pay, but making the general labor work voluntary.[3]

On October 9, Guzman conducted a meeting with the mushroom harvesters. He explained what had been agreed to, and asked who would be willing to continue

[3] It appears there was some disagreement as to whether all general labor work would be voluntary. Some of the employees appear to have believed this, while San Martin's supervisors believed this did not apply to the preparation work for the mushroom beds. This resulted in some friction, after the contract was modified.

performing the general labor work at the lower rate of pay. Seven employees agreed to this, while eight refused. Guzman marked an employee list to show who had agreed, and gave it to the Greg Gardner.

Guzman testified that, on October 9, he also conducted a ratification vote on the contact modification, which was unanimously approved. The Charging Parties denied this took place. On this point, the Charging Parties are credited. Whatever else one might say about the quality of their testimony, each was adamant and convincing in his denial. Since each of them had refused to agree to work as a general laborer at the lower pay rate, along with five other employees, it is highly unlikely that such a vote, had it taken place, would have been unanimous. It is also noted that while the modification had been agreed to at the time of the meeting, it had not yet been drafted. Guzman's claim, that he read the proposal to the workers, denied by the only Charging Party asked about this, was not convincing.

The charges herein are dated October 5, the date of the last Step 1 grievance meeting between Guzman and the Gardners. It is undisputed that the Charging Parties did not formally request that Guzman take the grievance to arbitration. On October 15, Guzman and the Gardners executed the contract modification. Guzman testified that he believed the agreement also resolved any issue pertaining to the accrual of backpay for harvesters performing general labor work prior thereto, but the agreement itself is silent on that issue.

ANALYSIS AND CONCLUSIONS OF LAW

The Board does not appear to have decided any "duty of fair representation" cases. Unlike many other union-related labor relations issues, the doctrine establishing and defining this duty was largely developed by the United States Supreme Court, in response to lawsuits filed under section 301 of the National Labor Relations Act (NLRA)[4] and the Railway Labor Act. The National Labor Relations Board (NLRB) has also developed a body of law, interpreting NLRA section 8(b)(1)(a) as imposing a duty of fair representation on the labor organizations under its jurisdiction.[5]

In *Vaca v. Sipes*,[6] the Supreme Court cited the now-familiar prohibition against a labor organization, from treating the employees it represents in a manner which is "arbitrary, invidious or in bad faith." In the context of a failure or refusal to process a grievance, based on the breach of a collective bargaining agreement by an employer, it may well constitute an unlawful violation for a union to simply ignore the grievance. However, absent some invidious cause for failing to pursue the grievance, such as racial discrimination, or the grievant being a non-member or political opponent within the

[4] NLRA section 301 provides that lawsuits may be brought in the Federal District Courts for violations of collective bargaining agreements.

[5] The provisions under section 1154(a)(1) of the Agricultural Labor Relations Act parallel those found in section 8(b)(1)(a) of the NLRA. Section 1165 of the ALRA parallels section 301 of the NLRA. ALRA Section 1148 requires the Board to follow applicable precedents of the NLRA. Given the parallel language of ALRA sections 1154(a)(1) and 1165, and NLRA sections 8(b)(1)(a) and 301, it is concluded that cases establishing and defining the duty under the NLRA are controlling herein. Cases brought by employees dissatisfied with their union representation, under the Railway Labor Act, have also resulted in applicable court rulings treating this issue.

[6] (1967) 386 U.S. 171, at page 190 [64 LRRM 2369].

union, the cases almost unanimously provide wide latitude to union representatives in deciding how far to proceed. *Steele v. Louiville & Nashville Railroad Co, et al.* (1944) 323 U.S. 192, at page 203 [15 LRRM 708]; *Ford Motor Co. v. Huffman et al.* (1953) 345 U.S. 330 [31 LRRM 2548]. Later Supreme Court cases describe the conduct required as "intentional, severe and unrelated to legitimate union objectives," and so far outside a "wide range of reasonableness" . . . as to be irrational."[7]

Under the principles established by the above cases, it is clear that Respondent did not act in an arbitrary, invidious or bad faith manner in pursuing the grievance. Guzman met on several occasions with San Martin's owners, and attempted to obtain the wages due under the contract. The Gardners not only refused, but suggested they might cease doing business, or if not, they would hire new workers at the lower wage rate, in order to comply with the contractual provision. Faced with this, and taking into account the preservation of unit work, Guzman negotiated a modification, lowering the wage rate for harvesters performing general labor work, but making at least most of such work voluntary. There is no evidence that in dropping the grievance, or negotiating the modification, Guzman was motivated by any prohibited consideration.

General Counsel concedes that Respondent, as the exclusive collective bargaining representative, acted lawfully in entering into the contract modification, absent a showing of motivation based on prohibited considerations. General Counsel, however, contends

[7] *Amalgamated Association of Street, Electric Railway & Motor Coach Employees et al. v. Lockridge* (1971) 403 U.S. 274, at page 299 [77 LRRM 2501; *Air Line Pilots Association, International v. Joseph E. O'Neill* (1991) 499 U.S. 65, at page 67 [136 LRRM 2721].

that Respondent violated its duty of fair representation by dropping the grievance pertaining to the higher wages that accrued under the contract up to the point where the contract was modified. General Counsel further contends that Respondent is liable to pay the workers all of the money they earned, above the general labor rate, from the effective date of the contract, to the effective date of the contract modification.

In support of this proposition, General Counsel cites a number of cases stating that a collective bargaining representative may not bargain away employee wages or benefits that have already accrued under a collective agreement, without their consent. In effect, General Counsel argues that, even if Respondent acted in good faith, it breached its duty of fair representation by dropping the grievance. General Counsel further alleges that Respondent "bargained away" the vested wage rights when it negotiated the contract modification.

As General Counsel contends, the evidence shows that the employees' wages at the higher rate had vested, and they did not consent to foregoing such wages. While the undersigned also agrees that San Martin clearly violated the terms of the collective bargaining agreement, Respondent was not obligated to take the grievance to arbitration and/or sue San Martin under section 1165. The undersigned further disagrees with General Counsel's contention that Respondent "bargained away" the vested contractual rights, in negotiating the contract modification.

The case cited by General Counsel that most closely supports its position is *Hauser et al. v. Farwell, Ormun, Kirk & Company et al.* (1969) 299 F.Supp. 387 [72 LRRM 2001]. In that case, employees filed a class action lawsuit under NLRA section

301, where an employer ceased operations, and entered into a closure agreement with the union that applied all of the accured pension fund contributions to provide full pensions to the three most senior employees. The remaining employees, who had vested pension rights, were to receive nothing, and the employer was excused from funding the plan in the future. The rationale was that it was preferable for the senior employees to receive full pensions, rather than have all of the employees receive minor retirement benefits. The District Court found that since the pension rights had vested to the date of the closure agreement, the union had no authority to bargain away those rights without the employees' consent, even if it did so in good faith. The union and employer were held jointly and severally liable to pay for the accrued benefits. On the other hand, the Court held that the union acted within its authority in permitting the employer to cease contributing to the plan, absent a showing of arbitrary, invidious or bad faith conduct.

The *Hauser* decision relied heavily on the United States Supreme Court's ruling in *Elgin, Joliet and Eastern Railway Co. v. Burley et al.* (1945) 325 U.S. 711 [65 S.Ct. 1282]. *Elgin* was a lawsuit filed under the Railway Labor Act, seeking wages due under a collective bargaining agreement. The employees' union had filed a grievance with the Railway Adjustment Board, under the contact, and arrived at a settlement. Further related pay disputes arose, and the union filed another grievance. The Railway Adjustment Board denied the grievance, on the basis of the settlement agreement. The Court denied the employer's motion to dismiss the employees' lawsuit, based on the settlement. It found that the Railway Labor Act provided employees with an independent right to file suit for breaches of the collective bargaining agreement. Therefore, the union

could not bargain away that right without their consent. Since the pleadings raised a question of fact as to whether that consent had been given, it was inappropriate to grant summary judgment. The Supreme Court did not, in its decision, state that the union had violated its duty of fair representation and, on a motion for reconsideration, held that unions are not, under its decision, required to take every grievance to arbitration.[8]

In *Shatto et al. v. Evans Products Company, et al.* (C.A. 9, 1983), 728 F.2d 1224, also cited by General Counsel, the employer terminated a pension plan, and established a new one in negotiations with the union. The employer then transferred the accrued funds in the old plan to the new plan. Employees who argued they were vested under the old plan sued the employer. The Court held that if employees had vested rights under the old plan, the employer could not transfer the funds without their consent, even if the union agreed.

General Counsel further cites the District Court decision in *Adams et al. v. Gould, Inc. et al.* (1981) 93 Lab.Cas. (CCH) P13,472 [1981 U.S. Dist. Lexus 17535]. *Adams* involved an NLRA section 301 lawsuit, where the employer failed to provide accrued pension benefits for employees covered by a collective bargaining agreement. The union filed a grievance and pursued the matter to arbitration. After the arbitrator issued an award, the union and employer entered into an agreement, settling the grievance in a manner resulting in no pension benefits for many employees. The employer filed a motion to dismiss the suit, based on the arbitration award and settlement agreement.

[8] (1946) 327 U.S. 661 [66 S.Ct. 721].

Citing *Hauser*, supra, the Court held that the union could not bind the employees to forego their right to file the lawsuit, absent their consent. On appeal, the Court of Appeal reversed the District Court opinion, finding that the arbitration award itself did not provide for full payment of the allegedly vested pension benefits, and the subsequent settlement, provided for by the arbitrator, was within the parameters of the award.[9] General Counsel cites additional cases in support of his arguments, which the undersigned does not consider applicable to the facts herein.[10]

In *Strick Corporation* (1979) 241 NLRB 210 [100 LRRM 210] the NLRB considered a case where the union won an arbitration award granting reinstatement rights to striking employees. The union, without notice to the employees, subsequently bargained away that award, resulting in the loss of reemployment for the employees, in exchange for the employer signing a collective bargaining agreement. The employer had adamantly refused to sign a contract unless the award was vacated, and threatened to take a strike, if necessary. The NLRB applied a bad faith standard to the union's conduct, and

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[9] (C.A. 3, 1982) 687 F.2d 27 [111 LRRM 2001].

[10] *Local 13, International Longshoremen's and Warehousemen's Union v. Pacific Maritime Association et al.* (C.A. 9, 1971) 441 F.2d 1061 [77 LRRM 2160]; *Bennett v. Local Union No. 66, Glass Molders, Pottery, Plastics and Allied Workers International Union, AFL-CIO, CLC et al.* (C.A. 7, 1991) 958 F.2d 1429 [139 LRRM 2943]; *Hines et al. v. Anchor Marine Freight, Inc.* 424 U.S. 554 [96 S.Ct. 1048] and *Aguinara et al. v. United Food and Commercial Workers International Union, et al.* (C.A. 10, 1993) 993 F.2d 1463 [143 LRRM 2400] all applied a bad faith analysis to the unions' conduct. It has been found herein that Respondent did not act in bad faith. In *Smith v. Evening News Association* (1962) 371 U.S. 195 [83 S.Ct, 267], the United States Supreme Court held that an employee's NLRA section 301 lawsuit was not barred because the employer's alleged conduct would have also constituted an unfair labor practice, under the jurisdiction of the NLRB. Respondent does not dispute the Board's jurisdiction herein.

found that it acted in good faith by accepting terms beneficial to the bargaining unit as a whole. The employees' NLRA section 301 lawsuit was also dismissed, the Court applying a bad faith standard, and finding it not established. *Mauer et al. v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America et al.* (C.A.D.C., 1980) 105 LRRM 2883.

Assuming the Court decisions in *Hauser*, *Shatto* and *Adams* are applicable to a duty of fair representation case under the ALRA, they all involved instances where the union converted, or agreed to the conversion of the vested assets, so as to preclude the employees from recovering them by their own actions. The fact that Respondent's representative chose to drop the vested claims does not establish that he prevented the employees from pursuing them on their own. Contrary to General Counsel's interpretation of the evidence, the record fails to establish that the contract modification resulted in the vested wage claims being extinguished. Although Guzman assumed the modification disposed of the grievance in its entirety, the modification, by its terms, does not refer to, or cover the wage claims that accrued prior to its effective date.

As noted above, under section 1165, the employees may have had the right to file their own lawsuit to recover the wages. *Smith v. Evening News Association,* supra. [11] Although Respondent has sole authority, as the collective bargaining representative, to

[11] The collective bargaining agreement between San Martin and Respondent provided that the grievance/arbitration provisions were the exclusive remedy arising "out of the interpretation or application" of the agreement. Whether San Martin's conduct involved the interpretation or application of the agreement is open to debate. In any event, Respondent's conduct did not preclude the employees from pursuing any section 1165 rights that may have existed. See *Hines et al. v. Anchor Motor Freight, Inc.*, supra.

negotiate terms and conditions of employment, section 1156 of the Act specifically reserves the right, to individual employees, to present their own grievances to their employer, with specified conditions, independent of their union. By dropping the grievance regarding the accrued contractual wage rate, Respondent did not prevent the employees from pursuing their own grievances or, if not prohibited by the collective bargaining agreement, filing suit. See *Spellacy et al. v. Airline Pilots Association – International et al.* (C.A. 2, 1998) 156 F.3d 120, at page 130 [159 LRRM 2336], cert. denied (1999) 526 U.S. 1017 [119 S.Ct. 1251]. Inasmuch as the evidence fails to establish that Respondent acted in an arbitrary, invidious or bad faith manner, or that it prevented the employees from pursuing their own contractual or statutory rights, the complaint will be dismissed.

Assuming, however, that Respondent's conduct did violate its duty of fair representation, it is further concluded that no backpay award is appropriate. In lawsuits filed under NLRA section 301 and the Railway Labor Act, the measure of damages is the losses caused by each defendant, unless, as in *Hauser*, the union and employer jointly cause the contract violation, in which case, they are jointly and severally liable for all the losses. See also *Bennett v. Local Union No. 66,* etc., supra. Where the employer is the sole cause of the initial loss in contractual wages or benefits, the union is only liable for the damages it caused by failing to pursue a remedy. The union's liability may commence as of the estimated date that it could have secured a favorable arbitration award, or be based on its overall accountability for the loss. *Vaca v. Sipes,* supra; *Bowen*

v. United States Postal Service, et al. (1983) 459 U.S. 212 [103 LRRM 588]; cf. *Aguinara el al. v. United Food and Commercial Workers International Union*, supra;

In this case, Respondent played no role in San Martin's breach of the collective bargaining agreement. Inasmuch as Respondent and San Martin lawfully modified the agreement so as to terminate the contractual provision giving rise to this case, effective October 15, it is clear that no arbitration award could have issued by that date, and that Respondent caused no portion of the employees' losses. Therefore, Respondent would not be liable for any backpay, even if it did breach its duty of fair representation.

ORDER

The Second Amended Consolidated Complaint is hereby dismissed.

Dated: June 27, 2011

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Douglas Gallop
Administrative Law Judge, ALRB